

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WIZARD CORPORATION	:	DETERMINATION
D/B/A WIZARD PETROLEUM	:	
for a Hearing with Regard to a Bond Required	:	
under Section 283 of Article 12-A of the	:	
Tax Law.	:	

Petitioner, Wizard Corporation d/b/a Wizard Petroleum, 364 Maspeth Avenue, Brooklyn, New York 11211, filed a petition for a hearing with regard to a bond required under section 283 of Article 12-A of the Tax Law (File No. 804831).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, W. A. Harriman State Office Building Campus, Albany, New York, on December 18, 1987 at 1:15 P.M., with all briefs to be submitted by February 8, 1988. Petitioner appeared by Borenkind & Mondschein (Samuel H. Borenkind, Esq. and Morris A. Mondschein, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division properly required petitioner, as a condition of maintaining its registration as a motor fuel distributor, to file a surety bond in the amount of \$3,982,000.00.

FINDINGS OF FACT

1. On or about June 16, 1987 petitioner, Wizard Corporation, filed an Application for Motor Fuel Tax and Sales and Use Tax Reregistration. At the time of the application petitioner had a surety bond in the amount of \$500,000.00 on file with the Department of Taxation and Finance.
2. On October 7, 1987 the Audit Division advised petitioner that it was requested to provide security in the amount of \$3,982,000.00. The level of security approximated petitioner's motor fuel and sales tax liability for the six-month period December

1986 through May 1987.

3. The Audit Division declined to consider petitioner's offer of an accountant's compilation of petitioner's balance sheet as of January 31, 1985 as a basis for reducing the amount of security required. This balance sheet revealed the following information:

(a) current ratio:
$$\frac{\text{current assets}}{\text{current liabilities } \$595,552.00} = \frac{\$686,001.00}{\$595,552.00} = 1.15:1$$

(b) net worth (assets minus liabilities) = \$ 90,449.00

(c) only current assets were reported in the asset section of petitioner's balance sheet

4. On November 10, 1987 the Audit Division issued a Notice of Determination of Tax Due under Motor Fuel Tax Law to petitioner assessing penalty of \$117,270.65 and interest of \$40,947.90 for the period June 1986 through July 1986. The notice stated "[s]ince additional tax liability was paid per late filing of the returns, this assessment represents penalty and interest due on said return." At the time of the hearing, petitioner's representatives were in the process of preparing a petition to protest this assessment. With the possible exception of the foregoing notice, petitioner has been current in its payment of motor fuel tax and, with the possible exception of one other month, has been current in the payment of sales tax.

SUMMARY OF PETITIONER'S POSITION

5. At the hearing, petitioner maintained that the level of the bond was a legislative function that could not be delegated. Petitioner also argued that the requirement of a six-month bond is both arbitrary and penal in nature. That is, petitioner submits that security based on a potential tax liability for a period of 30 days would have been adequate to secure the interests of New York State. In this regard, petitioner notes that other states do not require more than three months' security. Moreover, according to petitioner, a bond in the amount sought is prohibitive. Lastly, petitioner argues that the Tax Law's provisions with respect to motor fuel are unconstitutional inasmuch as they discourage New York distributors from exporting. This argument proceeds on the premise that the interest which the State pays on refunds is insufficient to compensate for the initial cost of posting the security. Petitioner also argues that the security

requirement discourages distributors from doing business in New York.

CONCLUSIONS OF LAW

A. That Tax Law § 283(3) provides in part:

"The tax commission shall require a distributor to file with the department of taxation and finance a bond issued by a surety company approved by the superintendent of insurance as to solvency and responsibility and authorized to transact business in this state or other security acceptable to the tax commission, in such amount as the tax commission may fix, in an amount determined in accordance with rules and regulations prescribed by it, to secure the payment of any sums due from such distributor (i) pursuant to this article and (ii) pursuant to articles twenty-eight and twenty-nine of this chapter with respect to sales and uses of motor fuel. The tax commission shall require that such a bond or other security be filed before a distributor is registered, and the amount thereof may be increased at any time when in its judgment the same is necessary as a protection to the revenues under this article and articles twenty-eight and twenty-nine of this chapter."

B. That by section 18 of chapter 282 of the laws of 1986 the foregoing function of the Tax Commission was transferred to the Commissioner of Taxation and Finance.

C. That 20 NYCRR 414.1(c) provides:

"(c) The department, in order to protect article 12-A revenues, will periodically review the financial status of registered distributors and may, at any time subsequent to registration of any person, as a distributor, require any such distributor to submit to the department a completed:

(1) motor fuel distributor information report (form TP 187.16);
and

(2) current unqualified financial statement certified by a certified public accountant pursuant to an audit conducted by him."

Said regulation, at subdivision (d)(2), further provides, in relevant part, as follows:

"(2) Generally, if a distributor fails to supply an unqualified current financial statement as required by paragraph (c)(2) of this section, such distributor's registration will be cancelled. However, the State Tax Commission, on petition, either through the hearing process or on the

motion of the State Tax Commission, may waive the requirement for an unqualified current financial statement. If the State Tax Commission waives the requirement for an unqualified financial statement, it may instead require the distributor to file a bond in such amount as it deems appropriate, regardless of the net worth or financial status of the distributor."

D. That petitioner has not submitted, as required, an unqualified financial statement certified by a certified public accountant pursuant to an audit by such certified public accountant. In Matter of Benak Corp. (State Tax Commn., January 15, 1985) the State Tax Commission noted that "[t]he purpose of this requirement is to provide independent verification of the reliability of a distributor's financial statements and, in turn, its financial condition." Since petitioner has not submitted the required statement, the Audit Division could have cancelled petitioner's registration. However, in the alternative, it chose to permit a bond based on six months' potential tax liability. Such a requirement was justified in order to secure the collection of taxes in view of the difference between petitioner's net worth and petitioner's six-month potential tax liability. (Compare Matter of Barrier Oil Corp., State Tax Commn., March 18, 1986 [security representing six months' potential tax liability was upheld on the basis of the applicable regulation] with Matter of Campbell Oil Company, Inc., State Tax Commn., March 24, 1986 [the State Tax Commission considered, among other things, the fair market value of petitioner's fixed assets when deciding the amount of the bond to require].) The bonding requirement imposed by other states is irrelevant.

E. That petitioner's arguments pertaining to the delegation of legislative duties and the impact of the Motor Fuel Tax Law on interstate commerce are rejected inasmuch as the constitutionality of the laws of the State of New York is presumed at the administrative level.

F. That the petition of Wizard Corporation d/b/a Wizard Petroleum is denied.

DATED: Albany, New York

-5-

ADMINISTRATIVE LAW JUDGE